Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BRIAN MONTEFOLKA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The issue is whether petitioner's identification by the complaining witness was in violation of the petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.
2. The issue is whether the People of the State of Illinois improperly amending the charges of the home invasion count was in violation of the petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.
3. The issue is whether the People of the State of Illinois failing to prove the petitioner's guilt for home invasion and residential robbery with intent to rob beyond a reasonable doubt was in violation of the petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.
4. The issue is whether the closing argument of the People of the State of Illinois exceeding appropriate limits was in violation of the petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests this Court to issue a Writ of Certiorari to the Supreme Court of Illinois, to review that Court's decision and opinion entered on June 4, 1997 (App. 1).

OPINIONS BELOW

On June 4, 1997, the Supreme Court of Illinois denied the petitioner's petition for leave to appeal, entitled People of the State of Illinois, Respondent, vs. Brian Montefolka, Petitioner, No. 83199 (App. 1).

The denial of the petition for leave to appeal by the Supreme Court of Illinois, on June 4, 1997, affirmed the Illinois Appellate Court, First District, Sixth Division, decision of March 7, 1997, wherein the Appellate Court affirmed the jury's finding in the Circuit Court of Cook County, Illinois, that the petitioner was guilty of home invasion and residential burglary, for which conviction the petitioner received ten years' incarceration (App. 23).

JURISDICTION

1. The decision of the Illinois Supreme Court denying petitioner's petition for leave to appeal was entered on June 4, 1997, affirming the Appellate Court's decision that the petitioner was not denied due process under the Fifth and Fourteenth Amendments to the United States Constitution.

2. The decision of the Illinois Appellate Court, First District, Sixth Division, was entered on March 7, 1997, affirming the Circuit Court's ruling that the petitioner's due process rights under the Fifth and Fourteenth

Amendments to the United States Constitution were not violated, wherein the question of due process violations of the Fifth and Fourteenth Amendments was raised in proceedings before the Circuit Court, wherein the petitioner was found guilty of home invasion and residential burglary with intent to rob, for which finding of guilty the petitioner was sentenced to ten years for home invasion and seven years for residential burglary, with the petitioner being sentenced to ten years based upon concurrent sentencing.

3. The petition for writ of certiorari was filed less than 90 days from the denial of the petition for leave to appeal by the Illinois Supreme Court, said denial occurring on June 4, 1997.

4. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On June 13, 1995, a jury found Mr. Montefolka guilty on Counts 1 (Home Invasion), 3 (Residential Burglary with the Intent to Rob), and 5 (Attempt Aggravated Criminal Sexual Assault) and not guilty on Count 6 (Robbery).

On July 17, 1995, the lower court sentenced Mr. Montefolka to concurrent sentences of 10 years on Count 1 (Home Invasion), 7 years on Count 3 (Residential Burglary with the Intent to Rob), and 10 years on Count 5 (Attempt Aggravated Criminal Sexual Assault).

After an evidentiary hearing, the lower court denied petitioner's motions to quash arrest and to suppress identification. The evidentiary hearings were conducted on December 21, 1994 and on January 13, 1995.

Prior to trial, pursuant to motion to quash, Officers Shemanske, Quinn, and Horst and Sgt. Badoni gave evidence essentially identical to the evidence described below. On the motion to suppress identification, Mr. Hession, Mr. Wilson, Mr. McGuire, Officer Shemanske,

and Sgt. Badoni also gave evidence essentially identical to the evidence described below. Tom Novak was also called as a witness.

Certain evidence was developed during the identification hearing. Mr. Hession described some of the participants in the showup that resulted in petitioner's identification by the complaining witness. One was 5'7", 140 pounds with blonde hair and blue eyes and no mustache. A second was 6'2", 190 pounds with blonde hair and blue eyes. The third was 5'11", 185 pounds with brown hair and hazel eyes. 1/13/95 Transcript at 59-62. Mr. Wilson described a fourth participant, 5'11", 180 pounds with light brown hair. 1/13/95 Transcript at 66-68. Mr. McGuire and his brother were also participants in the line-up. Mr. McGuire was 5'9", 160 pounds with dark brown hair and brown eyes. His brother was 6'4", 230 pounds with brown hair. 1/13/95 Transcript at 79-80.

On stipulation between the parties, Brian Montefolka was identified as being 5'3", weighing 130 pounds, with black hair and brown eyes. (E37)

On May 4, 1994, the People moved to amend or vary Count I (Home Invasion) of the Grand Jury's indictment. Prior to May 5, Count I charged that petitioner entered the Bush home with knowledge or reason to believe that one or more persons were present. In fact, there was no evidence of knowledge or reasonable belief of the presence of people. On May 4, 1994, over petitioner's objection, the Court allowed a variance so that Count I now charged Mr. Montefolka with remaining in the Bush home after he learned that someone was present in it.

Trial Testimony

SUZANNE BUSH: The complaining witness was 49 years old and resided at 16026 Long Avenue in Oak Forest, Illinois. She is an employee at a local Dominick's and has two adult children and a 70 pound Labrador Retriever. (A-54, A-96)

On September 12, 1993 at about 4:00 a.m., Mrs. Bush was asleep in a second floor bedroom. Her dog was whining. Mrs. Bush walked downstairs looking for her dog. When she entered the living room, at a distance of about seven feet, she saw petitioner Brian Montefolka petting the dog. Mrs. Bush testified that she could see his face because a neighbor, four doors down, had outside lights burning. (A-58 to A-59, A-103) There were no lights on in the Bush house. (A-101) Petitioner was wearing a baseball cap backwards, a leather jacket, and jeans. (A-61, A-64)

When she saw petitioner, Mrs. Bush was terrified and hysterical. (A-127) She has never been as nervous or excited in her life as she was that night. (A-128)

According to Mrs. Bush, she asked "Who are you?" and petitioner stated "I'm Bill Johnson." Mrs. Bush said "What are you doing here?" and petitioner answered "I didn't think you were home. If you don't try anything, I won't hurt you." (A-60) She could smell alcohol and cigarettes on his breath. (A-64)

Mrs. Bush then described a scene where she ran to the front door, with petitioner fighting with her, placing her in a headlock, and dragging her back into the living room, where he told her twice to take off her underwear. (A-60-61) No other effort was made to disrobe Mrs. Bush. Petitioner did not bite, punch, kick, or scratch Mrs.

Bush. (A-164) He did not tear or damage her clothing. (A-165 to A-166) Petitioner did not attempt to touch, fondle, lay on top of, or caress Mrs. Bush. Petitioner did not expose himself and did not have a weapon. (A-173)

Petitioner and Mrs. Bush began to talk. Petitioner told her that he entered the house through the family room window. (A-62) Mrs. Bush went to her kitchen to get money for petitioner. (A-64) She promised not to call the police. (A-65) Petitioner took between $10 and $60. (A-204)

As petitioner left, Mrs. Bush held his jacket and said "You own a leather jacket and I don't even have one of these and you're stealing from me?" (A-66) Mrs. Bush ran to a neighbor's house and called the police. (A-67)

When the police arrived, Mrs. Bush described the offender as a 5'4" male, 150 pounds, dark hair, light sideburns and mustache, possibly Hispanic, wearing a dark T-shirt, leather jacket, baseball cap, and jeans. (A-68)

In a marked police car, the police took Mrs. Bush to a house at 157th and Ridgeland, where there was a party underway. They told her that they wanted to show her some of the people at the party. (A-69) When Mrs. Bush arrived at the party, the police advised her that the subject, the offender, was there, without Mrs. Bush first identifying the subject. (A-199)

Ten boys at the party walked out the front door of the house and down the driveway and formed a line-up around the police car. (A-195)

Mrs. Bush watched the young men. The last one was petitioner, whom she identified. Mr. Montefolka was not wearing a leather coat or a baseball hat. (A-70) None of the other boys looked like petitioner. (A-195)

Mrs. Bush then identified photographs of bruises on her neck, arm, knees, and left shoulder and blood by her ear, left elbow, and right leg. (A-80 to A-83)

Several days prior to the incident, at 9:30 p.m., a red Mustang was parked in front of the Bush house. Casey Knight, a neighborhood teenager, was in the front passenger seat. The car's stereo was playing. Mrs. Bush was trying to sleep. She came downstairs and asked Casey to move the car. She did not see the driver of the car. (A-71 to A-75)

SHIRLEY MATTHAY: Mrs. Matthay has been Mrs. Bush's neighbor in Oak Forest since 1972. (A-227 to A-229) At 4:00 a.m. on September 12, 1993, she awoke because Mrs. Bush's dog was barking. She saw a red, two-door Ford parked in front of her house and facing the Bush house. (A-229 to A-231) She generally keeps track of cars that park in front of her house and generally writes down license plate numbers. (A-240 to A-241)

Mrs. Matthay grabbed a flashlight, went outside to check the car, wrote down its license plate number, locked her front door, and walked to the police station. The station is about a mile away. It took her about fifteen minutes to walk there. She gave the police her name, address, and the car's license plate number, returned home around 4:45 or 4:50 a.m., and saw that the red car was gone. (A-233 to A-234; A-236)

HOLLY HORST: Ms. Horst is a radio dispatcher for the Oak Forest Police Department. She monitors emergency and non-emergency calls. (B-5-6) She worked the early morning shift on September 12, 1993. At 4:15 a.m., she received a 911 call from 16041 S. Long Avenue and dispatched police to the scene. (B-7-8)

About two or three minutes later, the reporting officer broadcast a description of the offender over the radio. The description was a 5'6" male, 140 pounds, possibly Hispanic, light mustache, dark hair, sideburns, blue jeans, leather jacket, baseball cap. Ms. Horst rebroadcast the description over the radio for others. (B-9-10)

At 4:21 a.m., Shirley Matthay entered the police station to report a suspicious car parked in front of her house. She gave her name and address. (B-10) Ms. Horst ran the license plate number through the Secretary of State computer which reported that the car was a 1990 Ford hatchback registered to Domingo Montefolka, 15425 Ridgeland Avenue. Ms. Horst broadcast this information at 4:22 a.m. (B-11)

HELEN SIMONEK: On September 12, 1993, Ms. Simonek was working as the register clerk at the Keane Service Station at 159th and Long Avenue. (B-25) At 4:25 a.m., a short, young, Hispanic male wearing dark blue jeans and a dark T-shirt came into the station and bought cigarettes. He placed his baseball cap on the counter. She identified Brian Montefolka. (B-28, B-52)

Shortly after Mr. Montefolka left the gas station, Oak Forest policemen arrived. Ms. Simonek described the petitioner to the police. (B-29) She identified still photographs of video film from the station's security camera. The film was taken at 4:27 a.m. on September 12, 1993. (B-31)

CASEY KNIGHT: Casey Knight is 19 years old, works at a country club, and lives with his parents in the house immediately south of the Bush house. (B-58)

Mr. Knight knows petitioner. They played sports together. (B-59) On September 19, 1993, Mr. Montefolka

drove Mr. Knight home in his red Mustang and dropped him off at approximately 9:30 p.m. (B-60) The young men were playing the car radio. The complaining witness, Suzanne Bush, asked them to turn down the radio and to pull the car into Mr. Knight's driveway. Petitioner complied with these requests. (B-61)

WILLIAM SHEMANSKE: On September 12, 1993, Officer Shemanske was working alone as an Oak Forest patrolman. (B-80) At 4:15 a.m., the police dispatcher reported an attempted sexual assault at 16041 S. Long. Officer Shemanske arrived at the scene at 4:16 a.m., at the same time as Sgt. Badoni. (B-81)

After speaking with Mrs. Bush, Officer Shemanske dispatched a description of the offender. (B-82) The description was a Hispanic, black hair, 5'4", 160 pounds, light mustache and sideburns, wearing a brown leather jacket and blue jeans. (B-83)

Officer Shemanske received a radio dispatch telling him to bring Mrs. Bush to 157th and Ridgeland for a showup for identification of a possible offender. He did so. (B-84-85)

Eight suspects walked out of the house and around Officer Shemanske's squad car. Mrs. Bush identified petitioner as the person who entered her home. He was not wearing a baseball hat or a leather jacket. (B-86-88)

Officer Shemanske could not describe the other suspects in the showup. (B-125) No other 5'4" Filipino males were in the showup. (B-127)

WALTER SHERK: Mr. Sherk is a shoe mark identification expert with the Illinois State Police forensics department. (C-1-8) He examined eight photographs of

shoe prints from the scene of the crime and petitioner's shoes. (C-14) Petitioner's shoes are a common variety. (C-40)

Mr. Sherk could not state the size of the footprints, but determined a pattern from the photographs because they were of one print, taken in mud, distorted by some grass, and only a part of a shoe print. He was not able to draw any conclusions. He could not testify that petitioner's shoes made or did not make the marks outside the Bush home. (C-33, C-43)

MICHAEL SHAUGHNESSY: Mr. Shaughnessy was an evidence technician with the Oak Forest Police Department. (C-57) His specialty is fingerprint evidence. (C-58) He found four latent prints and one palm print on the front door of the Bush house. Only one was suitable for comparison. (C-68) He also found a shoe print in a muddy area right outside the rear window, the point of entry by the Bush home invader. (C-70) He took ten to fifteen photographs of the shoe print and brought a soil sample back to his laboratory. (C-72) He took petitioner's shoes for comparison. (C-77)

Mr. Shaughnessy did not take any fiber samples from the living room carpet. (C-103) He determined that the point of entry into the Bush home was the family room window. He found no mud on the sofa, the stairs, or the carpet or in the hallway, kitchen, dining room, living room. (C-105) Although he had a camera and otherwise took pictures, he took no photographs of the point of entry or the point of exit or of the showup or of any of the young men who appeared in the showup. (C-109, C-124) No search warrant was obtained to search petitioner's house for the money taken from Mrs. Bush, the leather jacket, or the baseball cap. (C-149)

CHARLES QUINN: Officer Quinn is an Oak Forest patrolman. (C-152) At 4:16 a.m. on September 12, 1993, he heard two dispatches. The first identified that there had been a home invasion and sexual assault. The second described the offender and his car, a Mustang with Illinois plates UH 2900, registered to Domingo Montefolka at 15425 Ridgeland Ave.

Officer Quinn went to the Montefolka residence and met Sgt. Badoni there. (C-154, C-155) He saw a vehicle turn onto Ridgeland, then stop in the middle of the street about a half block away from the house. (C-156) While police searched the Montefolka driveway and garage for the Mustang, the car drove to and parked in front of the house. Its plate was UH 2900. (C-158)

Officer Quinn identified petitioner as the driver. He testified that petitioner stated that he was at a party and that he lent his car to Brian Wilson for a half hour. (C-161)

The officers asked petitioner to accompany them to the party to find Brian Wilson. Petitioner was not wearing a leather jacket or baseball cap. (C-162)

Petitioner walked ahead of Officer Quinn into the party. He said to the others "Hey man, tell them I've been at the party no matter what. They got me on some shit I did earlier." (C-164) Officer Quinn arrested petitioner and placed him in the squad car. (C-165)

Officer Shemanske brought Mrs. Bush to the party for a showup. Officer Quinn took Mr. Montefolka from the squad car into the house to participate in the showup with seven other young men. (C-166) Mrs. Bush identified petitioner. (C-170) Officer Quinn cannot describe any

of the other young men who participated in the line-up. (C-210)

Officer Quinn searched for petitioner's brown leather jacket and baseball cap. He did not find the jacket. He recovered a baseball cap on Ridgeland Avenue. (C-171)

DANIEL HESSION: Mr. Hession was the host of the party on September 11 and 12, 1993. It began around 8:00 p.m. (C-234) He was drinking beer from 8:00 p.m. until 3:00 a.m.

Mr. Montefolka arrived after midnight and was wearing jeans and a brown leather jacket. (C-235) At approximately 12:30 p.m., Mr. Hession asked him to leave. He returned two hours later and was again asked to leave. (C-236) Mr. Hession next saw petitioner at 4:45 a.m. when he returned to the house with the police. (C-237)

Every male present in the house participated in a line-up. (C-240) Everyone was dressed casually. No other 5'4" Filipino males were in the line-up. (C-255)

JOHN ALVAREDO: John Alvaredo is a Dolton Police Officer and attended the Hession party. (C-257) He arrived at 11:15 p.m. (C-258) He saw Mr. Montefolka who was wearing a dark Boston Red Sox baseball cap, a leather jacket, and blue jeans. (C-260) He asked petitioner to leave the party. Petitioner left at 12:30 a.m. and returned around 2:00 a.m. (C-261)

TERRANCE MCGUIRE: On September 12, 1993, Mr. McGuire was at the Hession party and was present at the line-up with about eight other people. He is 5'9" and weighs 160 pounds. His brother Dan was also at the party and in the line-up. Dan McGuire is 6'4", weighs 230, and has long brown hair. Neither McGuire had face

hair or wore glasses. (D-45 to D49) There were no Hispanic-appearing people in the line-up. (D-53)

PAUL BADONI: He is an Oak Forest Police Sergeant. (D-55) On September 12, 1993, he was Watch Commander and on patrol. (D-56) He was monitoring calls and heard one for the Bush house. (D-57) He searched the neighborhood for about ten minutes. (D-61, D-64) He learned that a suspicious vehicle in the area had been parked in a driveway just north of the scene of the crime. (D-66)

Sgt. Badoni called by radio to bring Mrs. Bush to the party for a showup to possibly identify the offender in the matter. (B-117)

He and Officer Quinn went to the residence where the vehicle was registered, where they saw the vehicle. It was in front of the Montefolka home and petitioner was sitting in it. (D-68 to D-70)

The police and Mr. Montefolka then went into the Montefolka home. (D-71) There was no search warrant. (D-88) The police told petitioner that they were investigating criminal activity. Mr. Montefolka told them that he just left a party at 157th and Ridgeland and that he loaned his car to Brian Wilson. (D-92-94)

LEEANNE GRAY: Leeanne Gray is a forensic scientist with the Illinois State Police in Rockford and specializes in fingerprint analysis. (D-116 to D-120) She received latent prints from the areas of the Bush home where petitioner allegedly stood. She was given four latent lifts and petitioner's prints for comparison. The latent prints are not Brian's prints. (D-130 to D-147)

TIM KRISTIN: Tim Kristin is the Oak Forest police officer who released petitioner on September 14, 1993. At

that time, petitioner was given the items found upon him at the time of his arrest. These were $4.48, a watch, and a key. (D-172)

STEVEN LIPINSKI: Steven Lipinski is an Oak Forest police officer assigned to the investigation of the Bush home invasion. (D-173-175)

He went to Keane Gas station and talked to Helen Simonek, an employee. He told her about the home invasion. (D-180) She told him of a short dark-complected male, medium build, possibly of Spanish descent, facial hair, and Boston Red Sox cap. At 3:56 a.m., this person went into Keane and bought a pack of cigarettes. (D-181 to D-182)

THOMAS NOVAK: Tom Novak was at the party. (D-194) He went there with friends at about 11 p.m. and stayed until 6 a.m. He is 5'7", 160 pounds with dark brown hair and blue eyes. (D-195 to D-197) There were about twenty people at the party and about five or six who were his age. (D-198)

GREG WILSON: Greg Wilson is 19 and has been Mr. Montefolka's friend for ten years. (D-219 to D-222) Mr. Wilson was with petitioner at his home at 8 p.m. on the evening before the crime. They then went to a friend's house. He borrowed petitioner's car for about a half hour around midnight. (D-223, D-225 to D-230)

Petitioner owned a black leather jacket. (D-225 to D-230) Mr. Wilson never saw him with a brown leather jacket. (D-231) That evening, petitioner wore whitish blue jeans, white socks, black shirt, no leather jacket, and a Detroit Pistons hat. (D-233 to D-234)

ANGELA MONTEFOLKA: Angela Montefolka is petitioner's mother. (D-264) Petitioner has particular facial

characteristics. (D-265) He has birthmarks on his left cheekbone and above the left eyebrow and a scar on his forehead. (D-266)

Mrs. Montefolka purchases petitioner's clothing. (D-267) He has faded jeans and black shirts. (D-168) He does not own a brown or tan leather jacket. (D-169) He had a black jacket, but lost it. (D-270) She also buys petitioner's hats. (D-281) He did not own a hat like the one in evidence. (D-275)

September 11 is Mrs. Montefolka's birthday. The family had dinner at a Red Lobster and returned home at 5:00. (D-271) Brian went out with Greg Wilson. (D-272) He was wearing jeans and did not have a brown leather jacket. (D-274)

RALPH MEYER: Ralph Meyer is a forensic scientist. (E-12 to E-16) He conducted soil analysis on petitioner's gym shoes and on the soil outside the Bush home. The soils did not match. (E-17 to E-31)

The opinion and answering final arguments went without incident. The People's closing argument contained highly unusual and highly prejudicial remarks. The People began and continued their argument in the following fashion:

BY ASA MILAN:

> Ladies and gentlemen of the jury, I must apologize, because you know now after hearing that closing argument, we have been discovered. You now know as you sit there today that myself and Assistant State's Attorney Tom Byrne and just about every member of the Oak Forest police department and Suzanne Bush and Shirley Matthay and every witness in this room conspired to convict Brian Montefolka.

You now know the most incredible conspiracy in the history of Cook County has been concocted in order to convict this individual. You now know on September 12, 1993, we all got together and sat around in Oak Forest and said, who should we pick out of the air to charge with these crimes. And guess who we picked. The defendant, Brian Montefolka.

That's the defense in this case. That defense is ludicrous.

E-146 to E-147. The prosecutor then proceeded to detail an alleged conspiracy of witnesses, law officers, and lawyers. He concluded that:

BY ASA MILAN:

If you take that into consideration with all the other evidence, the car outside of the house and the hat and his statements and her I.D. within 45 minutes, this defendant is painted in guilt beyond a reasonable doubt. But I want you to look at it. If you guys go back and look at pictures and the shoes and say, Milan is wrong, the state's attorney is wrong, that's fine. I'll live by it. But I don't think you are going to do it. I think you will say, He's right, it is the shoe, because he did it. Because this is a conspiracy, that's embarrassing, that defense, humiliating.

E-159 to E-160.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S IDENTIFICATION BY THE COMPLAINING WITNESS WAS IN VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At App. 6-7 of the appellate court opinion, the appellate court relied principally on *People v. Moore*, 266 Ill.App.3d 791, 796-97 (1994), for whether there was a justification to permit a showup identification, in this instance, and that the justification is based upon the following factors, slip opinion:

> "[t]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and length of time between the crime and the confrontation."

With reference to identifying the petitioner, at App. 7 of the slip opinion, the appellate court noted that Mrs. Bush, the victim, had an ample opportunity to view the petitioner from a variety of angles.

Specifically, the appellate court observed that the victim faced the petitioner "at all times," including from such distances as nine inches.

Also, the appellate court asserted that the victim had been involved in extended conversation with the petitioner, and as a result she was able to detect the odor of beer and cigarettes on his breath.

Further, the appellate court stated that the victim had accompanied the petitioner to the kitchen and walked him to the front door.

Yet, although the victim had ample opportunity to observe the petitioner from a variety of angles, and was facing the petitioner at all times, and was engaged in extended conversation with the petitioner, and was close enough to detect the odor of beer and cigarettes on his breath, and accompanied the petitioner in the kitchen and walked him to the front door, nevertheless the victim did not identify the petitioner's birthmarks on his left cheekbone and above the left eyebrow, and the scar on his forehead, to which facial characteristics Angela Montefolka, the petitioner's mother, testified at D-266.

Significantly, the victim's lack of description relating to the petitioner's face would be a basis for striking the identification of an accused as being vague, doubtful, and uncertain, in violation of the accused's due process rights. *People v. Sanders*, 4 Ill.App.3d 493 (5th Dist. 1972), at 499-500, citing *People v. Blumenshine*, 42 Ill.2d 508 (1969), that the identification of the defendant must be clear, convincing, and untainted, or of independent origin.

The identification by the victim, in this matter, was not clear, convincing, and untainted, or of an independent origin, when the victim testified that, although there were no lights on in the Bush house, she was able to identify the petitioner by outside lights burning four doors down (A-58 to A-59, A-105), thereby raising reasonable doubt about the victim's accuracy in describing the offender as being 5'4", male, 150 pounds, with dark hair, light sideburns and mustache, and possibly Hispanic, wearing a dark T-shirt, leather jacket, baseball cap, and jeans, which description was furnished by the victim upon the police arrival to investigate the crime.

Very importantly, when the police arrived, in the victim's description of the petitioner, she did not include *any reference* that she had detected the smell of beer and cigarettes on the petitioner's breath, although at trial, she testified that she made such detection.

Another factor that has a bearing upon the victim's testimony, thereby raising reasonable doubt, is that the victim was terrified and hysterical (A-127), and had never been as nervous or excited in her life as she was that night. (A-128)

As was noted in *People v. Sanders*, 411 Ill.App.3d 493 (5th Dist. 1972), at 498, the inconsistency of a victim's description before and at trial, such as relating to breath smelling of alcohol and cigarettes, and the victim's nervousness and excitement, cast a reasonable doubt upon the legitimacy of a proper identification.

Also, another fact raising reasonable doubt as to the identification is that, when the victim was describing the petitioner, she contended that he wore a leather jacket. She never described the color of that jacket when being interviewed initially by the police in investigating the crime.

However, subsequently thereafter, while Mrs. Bush was speaking with Officer Shemanske, who dispatched a description of the offender based upon information provided by Mrs. Bush (B-82), the description that was provided was that the offender was Hispanic (not "possibly" Hispanic as initially stated by Mrs. Bush), black hair, 5'4", 160 pounds (not 140 pounds as initially provided to the police), light mustache and sideburns, wearing a *brown* leather jacket (while the color of the jacket was not initially provided to the police), and blue jeans. (B-83)

In the trial, Mr. Wilson, a 19-year-old and a friend of the petitioner, who was with the petitioner at about 8 p.m. on the evening before the crime, testified that he had never seen the petitioner own a brown leather jacket. (D-231)

In conjunction with Wilson's testimony, Angela Montefolka, petitioner's mother, at D-267, testified that she had purchased the petitioner's clothing, and that the petitioner never owned a brown or tan leather jacket. (D-169)

Also, Mrs. Montefolka testified that the petitioner never owned a Boston Red Sox baseball cap.

At the time of the showup, when the victim identified the petitioner, he was wearing neither a Boston Red Sox cap, nor a brown leather jacket; in fact, he was wearing no jacket.

The appellate court, in its opinion, at App. 6, identified the viewing of the petitioner with other similarly aged males as a showup; showups have been observed to carry with them a dangerous degree of improper suggestion, *People v. Blumenshine*, 42 Ill.2d 508 (1969), at 512. Here, the showup is highly suggestive not only because no one in the showup was short and Hispanic, but also because the petitioner was the only Asian-Filipino in the showup, and the heights of the other men in the showup ranged from a minimum of 5'7" to a maximum of 6'4", and the weights ranged from a minimum of 140 pounds to a maximum of 230 pounds. 1/13/95 transcript at 79-80.

Furthermore, the physical evidence did not support the identification. The forensic scientist, specializing in fingerprint analysis, testified that she received latent prints

from the areas of the Bush home where petitioner allegedly stood. She was given four latent lifts and petitioner's prints for comparison. The latent prints were not petitioner's prints. (D-130 to D-147)

Likewise, the forensic scientist conducted a soil analysis on the petitioner's gym shoes, and the soil outside Bush's home, with the soil not matching. (E-17 to E-31)

Because of the above analysis, the Appellate Court erred in rejecting the petitioner's contention that the *Telfaire* instruction should have been given to the jury to "prevent the danger of mistaken identification as a threat to justice," since the identification testimony of Mrs. Bush was not altogether reliable as it related to a short encounter—at most fifteen minutes—in an unlit home under conditions where she was extremely agitated and frightened. Under these circumstances, the identification was fraught with possibilities of mistake.

Reviewing the evidence from the standpoint of the totality of the surrounding circumstances, Officer Shemanske testified that Mrs. Bush informed him that the offender was with her a few minutes, five minutes (B-119), not fifteen or twenty minutes as Mrs. Bush had testified in the court proceeding.

Further, Officer Shemanske testified that he denied that the victim had informed him about the following in regard to the offender: his short nose (B-99), his wearing a black White Sox T-shirt (B-102), the odor of alcohol on his person (B-103), the smell of cigarettes on his person (B-105), his wearing a leather jacket (B-109), the color of his baseball cap (B-98), his age (B-103), the specific color of his blue jeans (B-112), and the color of his eyes (B-112). Officer Shemanske also testified that he denied

that the victim had informed him about walking to the door with the offender (B-103), and opening the door for the offender (B-109).

Additionally, Police Sgt. Badoni testified that he was about three to five feet behind Officer Quinn at the time that Quinn heard the petitioner say "The cops are here and they're trying to get me on some shit I did earlier," but Sgt. Badoni testified that he did not hear that statement from the petitioner.

Very significantly, when Mrs. Bush was testifying, she could not identify the color of the baseball cap, as she had testified that it was dark. (A-65)

Based upon the totality of the surrounding circumstances, as expressed in *Neal v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972), the viewing of the petitioner was so wanting in fairness as to deprive him of the due process of law, *People v. Blumenshine*, 42 Ill.2d 508 (1969), at 511, and the appellate court was in error in denying the petitioner's motion to suppress the evidence of the petitioner's identification by the complaining witness in violation of the petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

II.

THE PEOPLE OF THE STATE OF ILLINOIS IMPROPERLY AMENDING THE CHARGES OF THE HOME INVASION COUNT WAS IN VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the court proceedings, the petitioner raised the issue of whether the State's amendment of the invasion count,

from the petitioner knowingly entered the Bush house with knowledge or reason to believe that one or more persons were present, to the petitioner knowingly entered the Bush house and remained there until he knew or had reason to know that one or more persons were present, was a formal or a substantive change.

At App. 8 of the appellate court opinion, the court states that, pursuant to Sec. 111-5 of the Code of Criminal Procedure, the formal part of an indictment can be amended, citing *People v. Coleman*, 49 Ill.2d 565 (1971).

In addition, the appellate court asserted that the petitioner could not claim surprise or prejudice, since the amendment had occurred one year before trial.

With reference to *People v. Coleman*, 49 Ill.2d 565 (1971), at 566-567, the original indictment stated: "Benjamin Arnold, Fred L. Thompson and Ira J. Coleman committed the offense of murder, in that they, intentionally and knowingly stabbed and killed Ollie Coleman with a knife, without lawful justification."

That indictment was subsequently amended to read: "Benjamin Arnold, Fred L. Thompson and Ira J. Coleman committed the offense of murder, in that they, intentionally and knowingly stabbed *and/or asphyxiated* and killed Ollie Coleman with a knife, *and/or hands and/or a bed sheet and/or blanket* without lawful justification."

Based upon the amending of the indictment, the court ruled that the means for taking the life, in this instance, was not an integral part of the offense that needed to be averred, as for example in the crime of assault with a deadly weapon, at 571.

In this matter, the issue is not the means employed for the commission of the crime, but the intent to commit the crime.

In *People v. Betts*, 78 Ill.App.3d 200, 397 N.E.2d 106 (1st Dist. 1979), a grand jury indictment may be amended only by a grand jury itself, if the amendment relates to a substantive change.

As was observed in *People v. Payne*, 194 Ill.App.3d 238, 550 N.E.2d 1214 (1st Dist. 1990), it is plain error to amend the charge from residential burglary with the intent to commit theft, to residential burglary with the intent to commit a felony, since it involved a substantial change.

In this instance, the amendment was a substantial change from the petitioner's intent to enter the victim's house based upon knowing or having reason to know that the victim was present in her house with the intent to cause her bodily harm, to the petitioner's intent of remaining at the victim's house until the petitioner knew or had reason to know that the victim would be present to cause her bodily harm.

It is the contention of the petitioner in this petition for writ of certiorari that the appellate court erred in permitting a substantive change without requiring the grand jury to participate, in violation of the petitioner's due process rights, irrespective of the fact that the petitioner could not claim surprise or prejudice, according to the appellate court slip opinion, App. 8.

The issue is not a claim of surprise or prejudice, but the issue is a substantive change affecting the due process rights of the petitioner that cannot be cured on the

basis of the substantive change occurring one year before trial.

Consequently, the petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated when the People of the State of Illinois were permitted to amend the charges of home invasion without requesting the grand jury to so amend.

III.

THE PEOPLE OF THE STATE OF ILLINOIS FAILING TO PROVE THE PETITIONER'S GUILT FOR HOME INVASION AND RESIDENTIAL ROBBERY WITH INTENT TO ROB BEYOND A REASONABLE DOUBT WAS IN VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As alleged in the indictment before it was amended, for Count I, Home Invasion, the People were required to prove beyond a reasonable doubt that: (a) without authority, (b) petitioner knowingly entered the dwelling place of another with knowledge or reason to believe that one or more persons are present and (c) intentionally caused injury to the victim, a person within the dwelling place. 720 ILCS 5/12-11.

There is an absence of evidence that the petitioner entered the Bush house with knowledge or reason to believe that one or more persons were present. In fact, one of the few statements attributed to Mr. Montefolka is "I didn't think you (Mrs. Bush) were home." (A-60) The People did not attempt to prove the point, did not argue it to the jury, and did not submit an instruction on it.

Therefore, Count I (Home Invasion) was not proven beyond a reasonable doubt.

The crime of residential burglary with the intent to rob requires proof beyond a reasonable doubt that defendant knowingly and without authority entered the dwelling place of another with the intent to rob. 720 ILCS 5/19-3.

The critical issue is whether Mr. Montefolka entered the Bush house with the intent to rob. It is inadequate to prove that petitioner developed the intent to rob after he entered the house. That intent had to exist simultaneously with the entry. *People v. Toolate*, 101 Ill.2d 301, 308, 461 N.E.2d 987, 990 (1984).

There are significant distinctions that must be made here. Section 5/19-3 defines residential burglary as the knowing and unauthorized entry of a dwelling place with the intent to commit a felony or theft. In the instant case, the People charged that petitioner's intent at the time of entry was to rob persons inside the house.

In *People v. Toolate*, 101 Ill.2d 301, 308, 461 N.E.2d 987, 990 (1984), the Illinois Supreme Court held:

> In the absence of inconsistent circumstances, this court has held that proof of unlawful breaking and entering is sufficient to infer the intent to commit theft. (*People v. Johnson* (1963), 28 Ill.2d 441, 443, 192 N.E.2d 864.) However, breaking and entering cannot be used to infer an intent to commit any other felony. If it could, the requirement of specific intent to commit that felony would be meaningless. There would be no need to prove any specific intent at all, since all types of intent would be inferred from the unauthorized entry. Intent is often, of course, inferred from circumstantial evidence. But that does

> not mean there is no separate element of intent, or that we can indulge in the hopelessly circular reasoning that the entry must be accompanied by an intent which stands proven by the entry itself.
>
> *People v. Toolate* does not stand alone.

In *People v. Payne*, 194 Ill.App.3d 238, 550 N.E.2d 1214 (1st Dist. 1990), defendant was charged with and convicted by a jury of residential burglary with the intent to commit a felony. There was no question that Mr. Payne broke into and entered his victim's dwelling place. His intentions in doing so were simply not proven and could not be surmised.

Lack of specific intent to commit a particular felony is found in many appellate decisions. *People v. Purnell*, 154 Ill.App.3d 220, 507 N.E.2d 195 (1st Dist. 1987), *People v. Soznoski*, 22 Ill.2d 540, 177 N.E.2d 146 (1961), *People v. Vallero*, 61 Ill.App.3d 413, 378 N.E.2d 549 (3d Dist. 1978), *People v. Perry*, 133 Ill.App.2d 230, 272 N.E.2d 766 (1st Dist. 1971), *People v. Matthews*, 44 Ill.App.3d 342, 358 N.E.2d 84 (1st Dist. 1976).

Based upon the argument advanced by the petitioner, there is no evidence that the petitioner's intent at the time of his entry into the Bush house was with the intent to rob, and therefore the finding of guilt for residential burglary with the intent to rob was not proven beyond a reasonable doubt, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, requiring that a person shall not be deprived of life, liberty, and pursuit of happiness without due process of law.

IV.

THE CLOSING ARGUMENT OF THE PEOPLE OF THE STATE OF ILLINOIS EXCEEDING APPROPRIATE LIMITS WAS IN VIOLATION OF THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At App. 18 of the appellate court opinion, the appellate court observed that the prosecutor's closing remarks were not a material factor in the jury's decision, and therefore the appellate court found that any error would be harmless.

But it is the position of the petitioner that the prosecutor's closing remarks were not based upon any evidence, with the consequence that those remarks were grossly improper and should not have been stated to the jury.

The defense in this case never suggests that a conspiracy to convict existed or that there was any concert of action by any of the witnesses or the law enforcement personnel or, perhaps more importantly, that the prosecutors were involved in any wrongdoing, much less present at a meeting on September 12, 1993. This argument was irreconcilably prejudicial.

It is grossly improper and unfair to suggest that petitioner has manufactured a fraudulent defense. *People v. Wilson*, 199 Ill.App.3d 792, 557 N.E.2d 571 (1st Dist. 1990). It is equally improper to argue, as here, that the accused has to provide evidence of some conspiracy in order to create a reasonable doubt. *People v. Wilson*, supra; *People v. Tyson*, 137 Ill.App.3d 912, 485 N.E.2d 523 (2d Dist. 1985). A prosecutor may not argue that, in order to believe defendant's witnesses, the jury must find

that each State witness is lying. *People v. Cole*, 80 Ill. App.3d 1105, 400 N.E.2d 93 (3d Dist. 1980); *People v. Crossno*, 93 Ill.App.3d 808, 417 N.E.2d 827 (3d Dist. 1981). The comments about an "embarrassing" and "humiliating" defense go beyond permissible inferences from the evidence and infringe upon the fact-finding function of the jury. *People v. Monroe*, 66 Ill.2d 317, 362 N.E.2d 295 (1977); *People v. Emerson*, 97 Ill.2d 487, 455 N.E.2d 41 (1983). They also constitute an impermissible expression of the prosecutor's personal opinion about the case.

Such improper remarks by the People of the State, in this matter, were remarks that constituted a "material factor" in the jury's decision in violation of the due process clause, and therefore should not be considered harmless error, as stated at App. 18 of the appellate court opinion.

Pursuant to the above observations, the petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated.

CONCLUSION

For the above-stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

SIXTH DIVISION
March 7, 1997

No. 1-95-2714

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	
BRIAN MONTEFOLKA,	)	Honorable Paul J. Nealis,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GREIMAN delivered the opinion of the court:

Brian Montefolka (defendant) was convicted by a jury of home invasion, residential burglary and attempted aggravated criminal sexual assault. Defendant was sentenced to 10 years' imprisonment for home invasion, 7 years for residential burglary, and 10 years for attempted aggravated criminal sexual assault, to be served concurrently. Defendant appeals, raising issues as to whether: (1) the post-crime "showup" was unfairly suggestive; (2) the State should have been allowed to amend the home invasion count; (3) defendant was proven guilty of the offenses beyond a reasonable doubt; (4) the trial court erred in refusing defendant's *Telfaire* instruction (*United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)); and (5) the State's comments during closing argument were improper. For the reasons that follow, we affirm in part and reverse in part.

The victim, Suzanne Bush (Bush), testified that she is 49 years of age and lives in Oak Forest, Illinois. On September 12, 1993, at approximately 4:30 a.m., Bush was sleeping in her upstairs bedroom when she was awakened by her dog's whining and went downstairs dressed in a nightshirt and underwear. Once downstairs, she observed defendant petting her dog. Although the interior of her home was not lighted, Bush was able to see defendant clearly in the light from neighboring homes.

Bush asked defendant who he was and what he was doing in her house. He identified himself as Bill Johnson and responded that he did not think she was home and that if she did not try anything, he would not hurt her.

Bush ignored this admonition and ran screaming to the front door. Defendant caught her at the door, placed her in a headlock and dragged her by the neck into the living room. Defendant threw her to the floor and a struggle ensued. Defendant's face was "inches" from her own.

During the struggle, defendant told Bush to take off her underwear. Bush continued to struggle, but the more she fought, the more defendant hurt her. Defendant continued choking her and again told her to take off her underwear. Bush again refused and the two continued to struggle.

Finally, Bush was able to engage defendant in conversation, asking him how and why he had broken into her home. Defendant responded that he needed money for his family and had entered through an unlocked window. Bush could smell alcohol and cigarettes on defendant's breath. She asked defendant if he would leave if she gave him some money. Defendant said "yes" and Bush gave him between $10 and $60 from the kitchen counter.

Bush promised not to call the police and walked defendant to the front door, locking it upon his exit.

Bush then dressed and crossed to a neighbor's house, where the police were summoned. Bush described defendant to the police as a male, possibly Hispanic, 5 feet 4 inches tall, 150 pounds with dark hair, a light mustache and sideburns, and wearing a dark "White Sox" T-shirt, brown leather jacket, baseball cap on backwards and blue jeans.

Approximately 40 minutes later, the police drove her to a house located a few blocks away in Oak Forest, where they believed they had located Bush's assailant. There was a party at the house and the police brought out eight male guests and walked each around the squad car. Before defendant reached the squad car, Bush identified him and noted that he was no longer wearing his leather jacket or baseball cap. Bush stated that defendant's face "was imbedded in her mind" and would be there for the rest of her life.

Bush returned to her house with the police, who began processing the scene for prints and other evidence. Bush identified pictures of injuries, including bruises on her neck, arm, knees and shoulder, and blood by her ear, elbow and leg. On cross-examination, Bush testified that defendant did not touch her in a sexual manner, did not take off any of his own clothing, and did not display a weapon.

Shirley Matthay (Matthay), Bush's neighbor, testified that, on September 12, 1993, she was awakened at 4 a.m. by the dog next door. Looking out her bedroom window, she observed a dark red, two-door car parked in front of her house. As was her habit, Matthay went

outside with a flashlight and took down the car's license plate number—UH 2900. Matthay then walked to the police station and reported the "suspicious" vehicle. When Matthay returned, the car was gone.

The Oak Forest police ran a computer check on the license number and discovered that the Mustang was registered to Domingo Montefolka, defendant's father. Officers were dispatched to the Montefolka residence located in the Village of Oak Forest.

Officers Quinn and Badoni arrived at the Montefolka residence and, as Quinn exited his vehicle, he observed a car turn onto Ridgeland Avenue, stop in the middle of the street, and then pull up in front of the house. The vehicle was a red Ford Mustang with license plate number UH 2900.

Quinn approached the driver, identified later as the defendant, and informed him that they were investigating some criminal activity that occurred earlier and that his car was possibly involved. Defendant told the officers that he had been at a party all evening and had loaned his car to Brian Wilson for approximately one half hour. Quinn described defendant as a male Hispanic with a light mustache and sideburns and dark hair who appeared short and weighted about 150 pounds. Defendant was wearing a black T-shirt with "White Sox" written on the front. Quinn did not observe a leather jacket or baseball cap.

Officer Quinn, Badoni and defendant each drove separately to the address which defendant gave as the location of the party he had attended. Defendant walked to the house ahead of the officers. Officer Quinn testified that defendant opened the door, rushed into the house

and said, "The cops are here. I have been here all night no matter what. They got me on some shit I did earlier." Following this outburst, the officers handcuffed defendant and placed him in custody.

Quinn was present for the identification and observed defendant, along with eight other male party guests, walk in procession around the squad car in which Bush was seated. Bush immediately identified defendant as her assailant.

Daniel Hession hosted the party and testified that defendant had been at his home for approximately 30 minutes, around midnight, but had been asked to leave because he was "loud and obnoxious." Defendant returned to the party an hour or two later and was again asked to leave. Defendant was wearing jeans and a brown leather jacket.

Defendant was placed under arrest and "Mirandized" by Investigator Shaughnessy at approximately 6:30 a.m. on September 12, 1993. Defendant told Shaughnessy that he "did not do anything" and had left the party only to get cigarettes at around 2 a.m. Shaughnessy took defendant's fingerprints for comparison with the latent lifts he had taken from the scene. The fingerprint and other forensic evidence was inconclusive in terms of identifying defendant as Bush's attacker.

Following closing arguments, defendant was found guilty of home invasion, attempted aggravated criminal sexual assault, and residential burglary, and not guilty of robbery. Defendant argues initially that the trial court erred in denying his motion to suppress evidence of his identification, where the showup was unnecessary and unfairly suggestive.

Specifically, defendant contends that there was no exigent need for the showup and that the procedure employed was highly suggestive of defendant because no other participant was short and "possibly Hispanic." The State maintains that the immediate showup was necessary because the police were looking for a suspect within minutes of the home invasion, burglary and attempted sexual assault. The police were required to act promptly to determine whether defendant was the perpetrator or whether they needed to continue their search. Also, the form of the showup was not unnecessarily suggestive and had a high degree of reliability.

We must determine whether the trial court's decision denying defendant's motion to suppress identification evidence was manifestly erroneous. *People v. Smith*, 274 Ill.App.3d 84, 89 (1995). We note preliminarily that, although defendant and the trial court characterize the identification procedure as a showup or "hybrid," placing defendant in a group of similarly aged males more closely resembles a lineup. For purposes of our decision, however, this distinction is immaterial, and we will review the trial court's "hybrid" analysis.

An immediate showup near the scene of a crime can be proper. *Smith*, 274 Ill.App.3d at 89; *People v. Manion*, 67 Ill.2d 564 (1977). Only when a pretrial encounter resulting in identification is 'unnecessarily suggestive' or 'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identification excluded under the due process clause. *Smith*, 274 Ill.App.3d at 89; *People v. Moore*, 266 Ill.App.3d 791, 796-97 (1994). The decision whether to permit a showup identification is based on the following factors: "[t]he opportunity of the

witness to view the criminal act at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *People v. Poole*, 167 Ill.App.3d 7, 14 (1988), quoting *Manion*, 67 Ill.2d at 571; *Neil v. Biggers*, 409 U.S. 188, 199, 34 L.Ed.2d 401, 411, 93 S.Ct. 375, 382 (1972).

In the present case, the facts demonstrate that Bush had ample opportunity to view defendant from a variety of angles. Defendant was facing Bush "at all times," including from such distances as nine inches. Bush engaged in extended conversation with defendant and was close enough to detect beer and cigarettes on his breath. She accompanied him into the kitchen and walked him to the front door.

Bush's description to the police was consistent and highly accurate, the crime and showup took place within an hour of each other, and Bush identified defendant out of a group of eight without hesitation, stating later that she would never forget his face. Bush's identification was inherently reliable and the trial court was correct to deny defendant's motion to suppress identification evidence.

Defendant argues next that the trial court erred by allowing the State to amend the home invasion count against defendant. An individual commits the offense of home invasion when:

> "without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is

present or he or she knowingly enters the dwelling place of another and remains in such dwelling place until he or she knows or has reason to know that one or more persons is present and

***

[i]ntentionally causes any injury to any person or persons within such dwelling place." 720 ILCS 5/12-11(a)(2) (West 1992).

The original grand jury indictment alleged that defendant was guilty of home invasion because he "knowingly entered 16026 S. Long, Oak Forest, Cook County, Illinois, the dwelling place of Suzanne B., when he knew or had reason to know that one or more persons are present and intentionally causes harm to any person or persons within such dwelling place." On May 4, 1994, over one year prior to defendant's trial, the State sought leave to amend the home invasion charge to reflect the alternative manner in which defendant committed the offense. The trial court, over defense objection, allowed the State to strike the phrase "when Brian Montefolka knew or had reason to know that one or more persons are present," adding in its place the phrase "and remained in 16026 S. Long until he knew or had reason to know that one or more persons was present."

The manner in which the offense is committed is a formal part of the indictment that can be amended pursuant to section 111-5 of the Code of Criminal Procedure. *People v. Coleman*, 49 Ill.2d 565 (1971); 725 ILCS 5/111-5 (West 1992). Further, defendant cannot claim surprise or prejudice, since the amendment came a year before trial.

Defendant next argues that he was not proven guilty of home invasion, residential burglary and attempted aggravated criminal sexual assault beyond a reasonable doubt. The relevant inquiry on appeal is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Young*, 128 Ill.2d 1, 49 (1989).

Defendant challenges the sufficiency of the home invasion count in its *pre*-amendment form, alleging that defendant did not enter the Bush residence knowing someone to be home. Since the count was properly amended to allege that defendant *remained* in the home after realizing Bush was present, and defendant undeniably did so, this argument is summarily rejected.

So too is defendant's challenge to the residential burglary charge. To sustain a conviction for residential burglary, the State is required to prove that defendant unlawfully entered the Bush residence with the intent to commit either a felony or theft therein. *People v. Monigan*, 204 Ill.App.3d 686 (1990). In the present case, defendant was indicted for residential burglary with the intent to commit robbery. A person commits robbery when he takes property from the person or presence of another by use of threat of imminent force. 720 ILCS 5/18-1(a) (West 1992).

It is undisputed that defendant's entry into Bush's home was unlawful. When asked by Bush why he was in her home, defendant replied that "he needed money for his family." Defendant assaulted Bush and left with between $10 to $60 in cash. Viewing this evidence in a light favorable to the prosecution, the State has met its

burden of proof. See *People v. Hopkins*, 229 Ill.App.3d 665, 672 (1992) (intent can be proved by circumstantial evidence).

Of more merit is defendant's challenge to his conviction for attempted aggravated criminal sexual assault. A person commits criminal sexual assault if he "commits an act of sexual penetration by the use of force or threat of force." 720 ILCS 5/12-13(a)(1) (West 1992). The offense is aggravated where defendant caused bodily harm to the victim or when it was committed during the course of the commission or attempted commission of any felony by the accused. 720 ILCS 5/12-14(a)(2), (4) (West 1992). An individual commits attempted aggravated criminal sexual assault when, with the intent to commit sexual assault, *he does any act that constitutes a substantial step toward the commission of sexual assault*. (Emphasis added.) 720 ILCS 5/8-4(a) (West 1992).

To sustain a conviction for attempted sexual assault, proof of specific intent to commit the offense of sexual assault is essential; however, such intent may be inferred from the circumstances of the assault. *People v. Beason*, 32 Ill.App.3d 305 (1975). A defendant cannot be convicted of attempted aggravated criminal sexual assault absent evidence that he had taken a substantial step toward completion of the forced act of penetration. *People v. Webster*, 175 Ill.App.3d 119 (1988).

After reviewing basic principles, we return to the specific facts of the case at bar. Bush found defendant on the first floor of her home and after an exchange of words, clad only in a nightshirt and underwear, ran to open the front door and escape. Defendant followed her to the door. The following testimony was elicited on direct examination:

"Q. What did you do?

A. I started to run and scream hysterically toward the front door *** I twisted the lock and tried to get the door open and he was on top of me by then, and we were fighting at the front door.

Q. When you say he was on top of you, what do you mean?

A. He was fighting with me *** he was trying to get my hand away from the door. And the next thing I knew he had me in a headlock and he dragged me into the front room by my small couch by the doorway and he had me to the side in a headlock with his hand around my neck and my head *** we just kept fighting. ***

Q. Suzanne, did you remain on your feet?

A. No, he had me on the ground. He had me with my knees out from underneath me and I was on the ground and he was fighting with me and struggling and fighting, and he told me to take off my underwear.

Q. When he had you on your knees in the dining room—or in the living room where was he in relation to you?

A. He was to my—the right of me. He was facing me. *** We kept fighting and struggling and I kept crying and screaming hysterically, please don't hurt me. Please, you're hurting me. And the more I struggled, the more I fought to get away, the more he hurt me and more he put his arms tighter around my neck choking me like that. And we fought for a while and then he told me to take off my underwear again.

Q. And when he told you to take your underwear off again, what did you say?

A. I told him no, there was no way. And we just kept fighting and fighting. And then finally I calmed down enough to be able to just sob."

On cross-examination, the following colloquy occurred:

"Q. Did he ever kneel on top of you and straddle over you?

A. Some type like that where he had his knees on top and he was around me.

Q. Were you flat on your back with him kneeling on top of you?

A. No, sir.

Q. During this entire seven to eight minutes while this struggle was going on did this person tear any of your clothing?

A. No, sir.

Q. Did he rip any of your clothing off?

A. No, sir. ***

Q. Did he attempt to lay on top of you?

A. No, sir.

Q. Did he attempt to touch or caress or fondle any parts of your body?

A. No, sir.

Q. Ma'am, did he start to take his clothes off?

A. No, sir. ***

Q. Did he expose himself in any way?

A. No, sir."

This is all of the testimony presented to the jury relating to attempted sexual assault. We observe initially that the State, in its brief to this court, misrepresents this testimony, claiming that defendant "threw her to the

ground and straddled her with his knees on top of hers, pinning her down" "while continually demanding that she take off her underwear."

The only overtly sexual aspects of defendant's conduct were his two requests that Bush remove her underwear. He made no overt act toward her genitals, did not use force to remove her clothing, nor did he expose himself. Bush acknowledges that defendant did not touch, caress or fondle any part of her body. Certainly, defendant was in a position, literally, to go further than simply asking her to remove her underwear. However, the issue is whether defendant's conduct constituted a substantial step toward the commission of aggravated sexual assault. While defendant's conduct is reprehensible, precedent suggests that he did not.

In a factually similar case, *People v. Rayfield*, 171 Ill. App.3d 297 (1988), the court reversed defendant's attempted sexual assault conviction, finding defendant's acts of unlawfully entering the victim's apartment, struggling with the victim, who was wearing a nightgown, threatening to kill her if she continued to scream, carrying her toward the bedroom and asking to see her vagina did not constitute a substantial step toward sexual assault. *Rayfield*, 171 Ill.App.3d at 299-300.

Similarly, in *People v. Pitts*, 89 Ill.App.3d 145 (1980), the court reversed a jury conviction on attempted aggravated sexual assault where an inmate assaulted a female prison guard, straddled her, threatened to kill her, felt her breasts and pawed at her pants before gyrating upon her until he experienced orgasm. In reversing defendant's conviction, the *Pitts* court found defendant did not make a substantial step toward sexual penetration be-

cause he made no overt move toward the victim's "genital area" and did not expose himself. *Pitts*, 89 Ill.App.3d at 147. Unlike the case at bar, the *Pitts* defendant made overt sexual movements toward complainant and initially attempted to disrobe her.

Our supreme court reversed a similar conviction, finding defendant's acts of driving victim to a remote area against her will, kissing her, announcing his intention to have sexual intercourse with her, covering her mouth and chasing her through a field did not amount to attempted rape. *People v. Bush*, 19 Ill.2d 151 (1960). This 36-year-old case seems out of touch with the views of modern courts and legislatures relating to crimes of sexual assault and abuse. It parrots old clichés from an era when a corroborating witness was necessary to sustain a rape conviction. While we note this supreme court case, we do not rely upon it to reverse defendant's conviction.

Recently, in *People v. Jones*, No. 80367 (January 30, 1997), the supreme court considered an attempted aggravated criminal sexual abuse conviction. In *Jones*, the defendant was alleged to have "performed a substantial step toward the commission of that offense, in that he disrobed in the presence of [D.R.], who was at least 13 years of age but under 17 years of age at the time, stimulated his [own] penis to erection and requested the said [D.R.] to masturbate him to orgasm, for the purpose of the sexual gratification of the defendant; and said defendant was at least 5 years older than [D.R.]." Slip op. at 1.

The majority found:

> "After careful consideration, we agree with the appellate court that this act of exposure, when added to

> the request for sexual conduct, was sufficient to constitute a substantial step notwithstanding the lack of any actual contact between defendant and the victim. 276 Ill.App.3d at 1008-09, citing *People v. Brewer*, 118 Ill.App.3d 189 (1983). We therefore believe the evidence at trial was sufficient for the jury to conclude that defendant was guilty beyond a reasonable doubt ***." Slip op. at 6.

The conduct at issue in *Jones* is readily distinguishable from defendant's conduct in the present case. Here, defendant made no attempt to disrobe himself or Bush. Thus, we do not have "an act of exposure" coupled with "a request for sexual conduct." We have only defendant's request that Bush remove her underwear.

Defendant's conduct, within the context of the above-cited cases, does not appear to qualify as a substantial step toward commission of sexual assault. Our case is quite similar to *Rayfield*, since both cases involved unlawful entry, physical assault, victims wearing nightgown/nightshirt, requests to see the victim's vagina or for victim to remove her underwear, followed by conversation and relatively nonthreatening parting of ways.

The well-intentioned dissent attempts to distinguish *Rayfield*; however, in so doing, the author neglect to mention that the *Rayfield* defendant required that he be allowed to "hold" the frightened victim, threatened to kill her if she screamed and then carried her toward the bedroom before he put her down and subsequently conversed with her on the couch. *Rayfield*, 171 Ill.App.3d at 298-99. The notion that the *Rayfield* defendant made a calm, nonthreatening sexual suggestion moments after threatening to kill her is a unique characterization of the defendant's conduct.

The dissent neglects to observe that in *Rayfield*, the defendant left only after the victim repeatedly advised him that her boyfriend was expected. *Rayfield*, 171 Ill. App.3d at 299. Even more curious is the dissent's conclusion that the *Rayfield* defendant did not demand that the victim disrobe. It is reasonable to inquire how the victim was expected to allow the defendant to "see her vagina" without partially disrobing. The totality of the *Rayfield* circumstances do not reasonably vary from those of the instant case.

Moreover, cases finding defendant's conduct culpable seem to be based on far more overt and violent sexual and related physical acts. See *People v. Sutton*, 252 Ill. App.3d 172 (1993) (punching, choking and threatening handicapped victim while pulling her pants off and attempting to remove his own); *People v. Kleba*, 110 Ill. App.3d 345 (1982) (acts of defendant in knocking complainant to the ground, repeatedly threatening to kill her, holding her neck in an immobilizing arm-lock and dragging her into an alley, ordering her to remove her jeans and underwear and then bend over and clasp her ankles, whereupon he began fondling her vagina, constituted a substantial step toward commission of the offense).

Limited by the thrust of these cases, it appears that defendant's conduct, even in the light that most favors the prosecution, was not a substantial step toward an act of sexual penetration. We find that defendant was not proven guilty of the offense beyond a reasonable doubt. We observe that our finding will not affect defendant's sentence, since the attempted aggravated sexual assault term is concurrent with the 10-year term for home invasion, and we see no reason to remand for resentencing.

Defendant continues to argue that the trial court erred in declining to submit defendant's *Telfaire* instruction. In *Telfaire*, the United States Court of Appeals suggested the use of several instructions to prevent the danger of mistaken identification as a threat to justice. *Telfaire*, 469 F.2d at 555. However, Illinois courts have consistently held that refusal to give a *Telfaire* instruction is proper when the jury receives adequate pattern jury instructions. See *People v. Masse*, 237 Ill.App.3d 348 (1992); *People v. Benson*, 71 Ill.App.3d 591, 594 (1979) (and cases cited therein).

In the present case, the jury was thoroughly instructed on the identification issues, and the identification itself, contrary to defendant's repeated assertions, was altogether reliable. The trial court did not err in refusing the instruction.

Lastly, defendant claims the following remarks, made by the prosecution in closing argument, were improper:

> "Ladies and gentlemen of the jury, I must apologize, because you know now after hearing that closing argument, we have been discovered. You now know as you sit there today that myself and Assistant State's Attorney Tom Byrne and just about every member of the Oak Forest police department and Suzanne Bush and Shirley Matthay and every witness in this room conspired to convict Brian Montefolka.
>
> You now know the most incredible conspiracy in the history of Cook County has been concocted in order to convict this individual. You now know that on September 12, 1993, we all got together and sat around in Oak Forest and said, who should we pick out of the air to charge with these crimes. And guess

> who we picked. The defendant, Brian Montefolka. That's the defense in this case. That defense is ludicrous. *** Because this is a conspiracy, that's embarrassing, that defense, humiliating."

Prosecutors are afforded wide latitude in making closing arguments, and the decision to allow certain remarks falls within the sound discretion of the trial court. *People v. Brooks*, 246 Ill.App.3d 777, 788 (1993). In addition to discussing the evidence and any reasonable inferences therefrom, a prosecutor may respond to comments made by defense counsel that invite or provoke such a response. *Brooks*, 246 Ill.App.3d at 788.

The prosecutor's remarks, though inappropriate, were arguably invited by defense counsel's earlier argument implying that a conspiracy existed to convict defendant. Specifically, defense counsel suggested that testimony was fabricated or embellished and that forensic evidence was "explained away" or simply missing. Defense counsel also, and rightfully so, objects to the characterization of his defense as "ludicrous *** embarrassing *** humiliating."

Improper closing remarks will only warrant reversal of a criminal conviction where such remarks result in substantial prejudice to the defendant. *People v. Smith*, 141 Ill.2d 40, 60 (1990). Substantial prejudice occurs where the remarks constitute a "material factor" in the conviction such that the jury may have reached an opposite result had the remarks not been made. *People v. McCall*, 190 Ill.App.3d 483, 493 (1989). In the present case, the prosecutor's remarks were not a material factor in the jury's decision, and we find any error to be harmless.

For the reasons set forth above, we affirm defendant's convictions for home invasion and residential burglary and reverse his conviction for attempted aggravated criminal sexual assault.

Affirmed in part and reversed in part.

ZWICK, J., concurs.

THEIS, J., concurs in part and dissents in part.

JUSTICE THEIS, concurring in part and dissenting in part:

I must dissent from the majority's determination that the State failed to prove beyond a reasonable doubt that defendant's conduct was a substantial step toward the act of sexual assault.

The majority accurately states the standard of review we must apply to defendant's challenge to the sufficiency of the evidence. Because inferences drawn from the evidence are well within the province of the jury, we must not substitute our judgment for the jury's with regard to the weight of the evidence or credibility. *People v. Jordan*, 282 Ill.App.3d 301, 668 N.E.2d 90 (1996). Reversal is inappropriate "unless the evidence is so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Campbell*, 146 Ill.2d 363, 375, 586 N.E.2d 1261, 1266 (1992).

The majority seeks guidance from *People v. Bush*, 19 Ill.2d 151, 166 N.E.2d 91 (1960), and *People v. Pitts*, 89 Ill.App.3d 145, 411 N.E.2d 586 (1980), while acknowledg-

ing that the holdings are "out of touch." Slip op. at 16. These opinions are not merely antiquated, they are entirely inapposite. The *Bush* decision involves a repealed rape statute, which required corroborating witness testimony to prove intent to forcefully engage in intercourse. *Bush*, 19 Ill.2d at 154, 166 N.E.2d at 93. Similarly, the court in *Pitts* acknowledged that it was bound by a 1961 definition of rape which penalized only forcible sexual intercourse. *Pitts*, 89 Ill.App.3d 145, 411 N.E.2d 586.

The sexual assault statute, however, criminalizes the act of forcible sexual penetration. The broadness of the term "sexual penetration" highlights the incompatibility of the attempted rape cases to the instant case. See 720 ILCS 5/12-13(a)(1) (West 1992). While the majority neglects to set forth the term "sexual penetration," the scope of culpable conduct is critical to the appropriate resolution of this case. Sexual penetration means:

> "[*A*]*ny contact*, however slight, between the sex organ of one person and the sex organ, mouth or anus of another person, or *any intrusion*, *however slight*, of *any part of the body* of one person or of any *** object into the sex organ or anus of another ***." (Emphasis added.) 720 ILCS 5/12-12(f) (West 1992).

"[T]he statutory definition does not require physical penetration but merely requires contact." *People v. Moore*, 199 Ill.App.3d 747, 773, 557 N.E.2d 537, 555 (1990), *appeal denied*, 133 Ill.2d 567, 561 N.E.2d 701 (1990), *cert. denied*, 498 U.S. 1031, 112 L.Ed.2d 681, 111 S.Ct. 690 (1991). Therefore, unlike *Bush* or *Pitts*, we need not find evidence that defendant intended to engage in sexual intercourse. Rather, reversal of defendant's conviction is inappropriate if any rational trier of fact

could infer that the defendant intended to: (1) contact the victim's sex organ with his sex organ or mouth; or (2) make "any intrusion" with "any part of [his] body" into the victim's sex organ. 720 ILCS 5/12-12(f) (West 1992).

In spite of the broadness of the sexual assault statute, the majority trespasses upon the province of the jury and reverses defendant's conviction. The majority relies heavily upon *People v. Rayfield*, 171 Ill.App.3d 297, 525 N.E.2d 253 (1988), for reversal, noting that both cases involved unlawful entry, physical assault, sexual suggestions, conversation, and the defendant's nonviolent departure. The critical distinction between *Rayfield* and the instant case, however, involved the circumstances surrounding the sexual suggestion.

In *Rayfield*, after a struggle, the victim was able to calm the assailant. The two sat on the victim's couch and engaged in conversation. The defendant got up to leave, but before he left the apartment he asked the victim if he could see her vagina. The victim refused and the assailant made no attempt to force the victim to comply with his request. Of significance is the *Rayfield* court's reliance upon the fact that not only did the assailant not disrobe, he did not demand that the victim disrobe either. The lack of an attempt to expose either party, coupled with a nonviolent sexual suggestion, tends to support the court's conclusion that there was a reasonable doubt as to whether the assailant took a substantial step toward committing criminal sexual assault.

Conversely, the defendant in this case knocked the victim to the floor and ordered her to take off her underwear. She struggled, begging him not to hurt her. The defendant choked the victim, repeating his demand to

disrobe. She again refused and continued to fight him. During the struggle, the victim persuaded the defendant to take her money and leave. Unlike the assailant in *Rayfield*, the defendant made a demand to disrobe, which was coupled with contemporaneous violence. These facts support the jury's conclusion that the defendant intended to contact the victim's sex organ in some manner. It is irrelevant that the defendant did not disrobe, as the act of sexual penetration is not contingent upon the defendant being exposed.

I believe the majority can find little solace in the Illinois Supreme Court's recent decision in *People v. Jones*, Docket No. 80367 (January 390, 1997). In *Jones*, the supreme court affirmed the jury's finding of attempted aggravated criminal sexual abuse where the defendant never touched his victim, nor restricted the victim's ability to leave the room. The court acknowledged the jury's right to infer intent from the defendant's exposure of his genitals coupled with a sexual suggestion, even in the absence of force or physical contact. The *Jones* decision in no way restricts the court's previous holding in *People v. Enoch*, 122 Ill.2d 176, 522 N.E.2d 1124 (1988), where the Illinois Supreme Court stated that "[e]vidence of an assault with concomitant disrobing of the victim is sufficient to support a conviction for attempted rape." *Enoch*, 122 Ill.2d at 198, 522 N.E.2d at 1135. The facts in the instant case satisfy this criteria.

While I join in the majority opinion as it pertains to all other issues raised on appeal, I cannot agree that this violent attack coupled with the demand to disrobe is evidence "so unreasonable, improbable, or so unsatisfactory" as to justify reversal of the jury's verdict.

(Letterhead of)

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June 4, 1997

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No. 83199 - People State of Illinois, respondent, v. Brian Montefolka, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 26, 1997.